IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 11, 2009 Session

SHARON E. PETTY, ET AL. v. THE CITY OF WHITE HOUSE, TENNESSEE

Appeal from the Circuit Court for Sumner County
No. 29117-C C. L. Rogers, Judge

No. M2008-02453-COA-R3-CV - Filed August 31, 2009

Plaintiffs filed suit against City for an injury sustained by falling in a hole located on a grass field owned by the City. In a bench trial, the court found that the City's immunity had been removed since the City had constructive notice of the dangerous condition on its property; the court awarded the Plaintiffs monetary damages. On appeal, the City challenges the trial court's finding that its immunity had been removed, evidentiary decisions, and award of discretionary costs. Finding that the City's immunity had been removed and that there was no abuse of discretion in allowing certain evidence to be admitted at trial, the judgment of the trial court is affirmed. Finding that the trial court exceeded the authority given by rule in the award of some discretionary costs, the award is modified.

Tenn. R. App. P 3 Appeal as of Right; Judgment of the Circuit Court Modified and Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Beth L. Frazier, Nashville, Tennessee, for the appellant, City of White House, Tennessee.

Joseph Y. Longmire, Jr., Hendersonville, Tennessee, for the appellees, Sharon E. Petty and Robert K. Petty, Sr.

OPINION

I. Procedural and Factual History

The City of White House, Tennessee ("City") owns a grass field ("Field"), upon which two sports fields, bleachers, and a concession stand were built. The City and White House Christian Academy ("WHCA") have an informal agreement, whereby WHCA's football team is allowed to play its games at the Field, during which times WHCA is allowed to set up a table between the two

sports fields to collect admission fees. On August 24, 2006, Sharon Petty arrived at the Field to watch a WHCA football game being played. As she was walking to the admission table, Ms. Petty stepped into a hole, causing her to fracture her right ankle, which required surgery.

On September 29, 2006, Ms. Petty and her husband, Robert Petty, ("Pettys") filed suit against the City for negligence in causing Ms. Petty's injuries, Ms. Petty's loss of enjoyment of life, and Mr. Petty's loss of consortium. The complaint alleged that the City's immunity from suit, governed by the Governmental Tort Liability Act ("GTLA"),[1] had been removed pursuant to the exception found at Tenn. Code Ann. § 29-20-204. Ms. Petty sought $250,000 in compensatory damages and Mr. Petty sought $130,000 in damages for loss of consortium.[2]

Along with their complaint, the Pettys filed a Motion to Allow Entry Upon Land for Inspection and Other Purposes, which was granted by order on October 25.[3] On November 17, the Pettys' "expert,"[4] Richard Packard, conducted an excavation and inspection of the hole, which revealed that a water irrigation system box had been installed, but was no longer in use, and that the box appeared to have sunk to the bottom of the hole.

On November 3, 2006, the City filed a Motion to Dismiss, asserting that the Pettys failed to state a claim upon which relief could be granted because the City's immunity from suit had not been removed pursuant to Tenn. Code Ann. § 29-20-204; the Pettys filed a response to this motion.[5]

On March 12, 2007, the City filed a Motion to Exclude, seeking to exclude all testimony, documents, and photographs relating to the Mr. Packard's November 17, 2006, inspection because he "excavated the hole" in violation of the court's October 25 order and because the "excavation" resulted in spoliation of evidence under Rule 34A, Tenn. R. Civ. P. The motion was denied by order entered on April 17. The City filed an answer on March 14, 2007, raising the affirmative defense of sovereign immunity pursuant to the GTLA, among other theories.

On July 28, 2008, the City filed a Motion for Summary Judgment, asserting that the Pettys "cannot prove the elements of their claim that are essential to prevail under the...exception to governmental immunity" found at Tenn. Code Ann. § 29-20-204 because the Field upon which Ms.

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[1] Tenn. Code Ann. § 29-20-101, *et. seq*.

[2] Mr. Petty died during the pendency of this action and Ms. Petty filed a Motion for Substitution of Party, seeking to be substituted as the proper party on behalf of her husband. The City did not oppose the motion and it was granted by the trial court.

[3] In its brief on appeal, the City admits that it neither opposed nor responded to this motion.

[4] At trial, there was some dispute as to whether Mr. Packard was ever qualified as an expert or whether his testimony could be considered expert testimony. This is not an issue on appeal.

[5] The record does not contain an order disposing of the City's Motion to Dismiss and neither party's brief on appeal addresses the disposition of the motion.

Petty's injuries occurred was not a public building, structure, dam, reservoir or other public improvement owned and controlled by a governmental entity as defined by the statute; the irrigation system box found by Mr. Packard at the bottom of the hole was a latent condition; and the Pettys could not prove that the City had actual or constructive notice of the allegedly dangerous or defective condition. The Pettys filed a response in opposition to the motion on August 22. On September 15, the trial court denied the motion, stating only that "[t]he Court, after hearing argument of counsel and the pleadings filed herein, denies [the City's] Motion for Summary Judgment."

On September 23, 2008, the City filed a Motion to Exclude Testimony and Opinions of Plaintiffs' Expert, asserting that Mr. Packard's opinions were inadmissible because the opinions in his affidavit were "misleading and directly contradicted by his deposition testimony"; the opinions were not "based on any scientific, technical, or other specialized knowledge as required for admissibility under Rule 702 of the Tennessee Rules of Evidence"; and the opinions, in certain respects, were irrelevant pursuant to Rules 401 and 402, Tenn. R. Evid.[6]

A non-jury trial was held on September 29, 2008, and an order entered on September 30 found that the City had constructive notice of the defect and, consequently, was liable for Ms. Petty's injuries. The trial court awarded the Pettys a total of $184,044.28 in damages, which included an award to Ms. Petty of $59,044.38 in medical costs, $75,000 for "effect on daily living from day of accident to day of trial," and $35,000 in "permanent injury/effects 16.83 years"; and an award to Mr. Petty of $15,000 in loss of services. The Pettys filed a Motion for Discretionary Costs, later amended, and the trial court awarded discretionary costs in the amount of $4,433.30 for all of the Pettys' requested expenses, except some fees for expert witnesses. The City appeals.

II. Statement of the Issues

The City asserts the following issues on appeal:

1. Whether the Trial Court erred in denying the City summary judgment and/or a directed verdict based on the City's immunity under the GTLA.

    a. Whether the Trial Court erred in finding that the condition of the Field constituted a public improvement under Tenn. Code Ann. § 29-20-204.

    b. Whether the Trial Court erred in finding that the City had constructive notice of the hole into which Ms. Petty fell.

2. Whether the Trial Court erred in denying the City's Motion to Exclude testimony concerning Mr. Packard's "excavation" of the hole into which Ms. Petty fell.

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[6] The record does not contain an order disposing of the City's Motion to Exclude; the City, in its brief on appeal, states that the trial court never ruled on the motion.

3. Whether the Trial Court erred in awarding discretionary costs to the Pettys.

On April 16, 2009, the Pettys filed with this Court a Motion to Dismiss, asserting that the City's appeal should be dismissed "to the extent it seeks review of the trial court's denial of the City's motion for summary judgment and/or directed verdict." On April 24, 2009, this Court entered an order reserving judgment on the motion "pending oral argument and submission of the case to the court for a decision on the merits." In an order filed simultaneously with this opinion, we find that the motion to be well-taken and grant same to the extent that the trial court's actions on the motions for directed verdict[7] and summary judgment[8] are not reviewable on appeal. Consequently, the City's first issue on appeal, insofar as it relates to the motions for directed verdict or summary judgment, has been disposed of pursuant to the contemporaneously submitted order.

The City, however, in its Statement of the Issues, also raised challenges to findings made by the trial court as sub-issues of that first issue. In its response to the motion to dismiss, the City asked this Court to look past the form of the issues raised and find that the "substance of the City's appeal is that the Trial Court erred in finding in favor of [the Pettys]." Thus, the question is whether the City's challenge to the trial court's findings - that the Field was a public improvement and that the City had constructive notice of the hole into which Ms. Petty fell - are reviewable on appeal.

"In order for an issue to be considered on appeal, a party must, in his brief, develop the theories or contain authority to support the averred position." *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001); *Bunch v. Bunch*, 281 S.W.3d 406, 409 (Tenn. Ct. App. 2008). "Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed to be waived and will not be considered on appeal." *Branum v. Akins*, 978 S.W.2d 554, 557 n.2 (Tenn. Ct. App. 1998); *Hawkins*, 86 S.W.3d at 531. "Courts have consistently held that issues must be included in the Statement of Issues Presented for Review" and "an issue not included is not properly before the Court of Appeals." *Hawkins*, 86 S.W.3d at 531; *Bunch*, 281 S.W.3d at 410.

Despite being categorized as sub-issues, the City has raised a challenge to the trial court's findings in its Statement of the Issues, *Hawkins*, 86 S.W.3d at 531, and has addressed the issues in its brief, along with argument, citation to authority, and citation to trial testimony. *Hawkins*, 86 S.W.3d at 531; *Branum*, 978 S.W.2d at 557 n.2. The City erred only in relating its challenge of the trial court's findings to the disposition of the motions for summary judgment and/or directed verdict, when it clearly sought to challenge the court's findings made at trial as well. Thus, in the interest of justice and to resolve this matter on its merits, we find that the City properly raised and briefed its challenge to the trial court's findings and that we can consider them on appeal. *Hawkins*, 86 S.W.3d at 531; *Bunch*, 281 S.W.3d at 410.

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[7] In its brief, the City fails to cite to any place in the record where it moved for a directed verdict and, upon a review of the record, we cannot find that any such motion was made. Since the City never moved for a directed verdict, there is no court action for us to review.

[8] "A trial court's denial of a motion for summary judgment, predicated upon the existence of a genuine issue of material fact, is not reviewable on appeal when a judgment is subsequently rendered after a trial on the merits." *Bradford v. City of Clarksville*, 885 S.W.2d 78, 80 (Tenn. Ct. App. 1994).

III. Analysis

A. Governmental Immunity

Tenn. Code Ann. § 29-20-201 provides that "all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary." Tenn. Code Ann. § 29-20-201(a). Governmental immunity can be removed pursuant to the GTLA in a number of ways. *Helton v. Knox County, Tenn.*, 922 S.W.2d 877, 881-82 (Tenn. 1996). In their complaint, the Pettys asserted that the City's immunity was removed pursuant to the exception found at Tenn. Code Ann. § 29-20-204, which states:

> (a) Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other *public improvement* owned and controlled by such governmental entity.
>
> (b) Immunity is not removed for latent defective conditions, nor shall this section apply unless *constructive and/or actual notice* to the governmental entity of such condition be alleged and proved in addition to the procedural notice by § 29-20-302.

Tenn. Code Ann. § 29-20-204 (emphasis added).

1. Public Improvement

The City asserts that the trial court erred in finding that the hole which caused Ms. Petty's injury was located on a "public improvement" to support the removal of governmental immunity pursuant to Tenn. Code Ann. § 29-20-204(a).[9] Both parties agree as to the meaning of "public improvement"[10]; the issue on appeal is whether the Field fits within that meaning. Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006).

In their briefs, both sides rely upon Black's Law Dictionary and a Tennessee Attorney General's Opinion to establish the meaning of "public improvement." Black's Law Dictionary defines "improvement" as "[a]n addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance." Black's Law Dictionary (8th ed. 2004). In an advisory opinion, the Tennessee Attorney General stated that "[a] public improvement, as

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[9] The trial court did not specifically find that the hole was located on a "public improvement"; however, since the trial court ultimately found that the City's governmental immunity had been removed, we consider the court to have implicitly found that the Field was a public improvement.

[10] In their brief on appeal, the Pettys states that "[t]he City...does not show any material disagreement as to the meaning of 'public improvement.'" In its reply brief, the City states that "[t]he parties agree that a 'public improvement' can be defined as..."

applied to a municipality, means generally an improvement upon the property of the municipality which furthers its operations and the interests and welfare of the public." Tenn. Op. Atty. Gen., 1995 WL 144718, at *2 (Tenn. A.G. 1995).[11]

The Pettys assert that the Field was a public improvement because the City "admitted that it own[ed] the Sports Field and consider[ed] it to be one of the City's park facilities"; was "responsible for controlling and maintaining the Sports Field and surrounding areas"; "admitted that additions were made to the Sports Field," including "two playing fields, bleachers and a concession stand"; and mowed and fertilized the Field. The City contends that "[t]he Field in this case does not morph...into an 'addition to' or 'improvement upon' real property simply because the City mowed it, fertilized it, and corrected any problems of which it became aware"; "used [it] for sporting activities"; "lined [it] with chalk"; or set "grandstands...upon it."

We find the Field to be a public improvement and that the hole in which Ms. Petty fell was a part of the Field; consequently, the exception to governmental immunity found at Tenn. Code Ann. § 29-20-204(a) has been met. It is uncontested that the City owned the Field and the constructions added to the Field (the bleachers, parking lot, concession stands, etc.) were improvements to the Field consistent with the definitions in both Black's Law Dictionary and the Attorney General's opinion. The City's development and maintenance of the entire Field was "an improvement upon the property of the municipality" and the entire Field "further[ed] [the City's] operations and the interest and welfare of the public" by providing residents and students a venue for engaging in outdoor activities and sporting events. Tenn. Op. Atty. Gen., 1995 WL 144718, at *2. The hole into which Ms. Petty fell was situated between the parking lot and the bleachers in a grassy area of the Field, and the fact that the specific area was not improved by construction, does not deprive the entirety of the Field of its classification as a public improvement. The trial court correctly denominated the location as a "city park patron/entry walkway area."

2. Constructive Notice

The City asserts that the trial court erred in finding that it had constructive notice of the allegedly defective condition located on the Field to support the removal of its governmental immunity pursuant to Tenn. Code Ann. § 29-20-204(b) because the Pettys failed to meet their burden of proving constructive notice and "of proving that the City could have discovered the hole through reasonable inspection." The Pettys assert that the City "knew there had been holes on the...Field" and that "the City, exercising ordinary care, could and should have discovered the hole" into which Ms. Petty fell.

The GTLA "codifies the common law obligation of owners and occupiers of property," which "imposes upon such owners/occupiers a duty to 'exercise ordinary care and diligence in maintaining their premises in a safe condition.'" *Elkins v. Hawkins County*, 2005 WL 1183150, at

[11] Both parties cited to a Tennessee Attorney General's opinion found at 1998 WL 423987 (Tenn. A.G. 1998) for this definition of "public improvement," however, the definition was originally found in the 1995 opinion.

*4 (Tenn. Ct. App. May 19, 2005) (quoting *McMormick v. Waters*, 594 S.W.2d 385, 387 (Tenn. 1980)). Owners "are under an affirmative duty to protect [visitors] against dangers of which they know or which, with reasonable care and diligence, they might discover." *Cornell v. State*, 118 S.W.3d 374, 378 (Tenn. Ct. App. 2003) (quoting *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989)).

The constructive notice element of Tenn. Code Ann. § 29-20-204(b) was discussed by the Tennessee Supreme Court in *Hawks v. City of Westmoreland*, 960 S.W.2d 10 (Tenn. 1997), which held:

> Under Tenn Code Ann. § 29-20-204, the Legislature specifically made the removal of governmental immunity conditional upon a plaintiff's allegation and proof that the governmental entity knew or should have known of the dangerous or defective condition which caused the plaintiff's injury. *Smith v. City of Covington*, 734 S.W.2d 327, 329 (Tenn.App. 1985). In other words, a plaintiff must allege and prove that the governmental entity had either actual or constructive notice of the dangerous or defective condition...
>
> "Constructive notice" has been defined by this Court as "'information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.'" *Kirby v. Macon County*, 892 S.W.2d 403, 409 (Tenn. 1994), quoting *Black's Law Dictionary*, 1062 (6th ed. 1990). Applying that definition, a governmental entity will be charged with constructive notice of a fact or information, if the fact or information could have been discovered by reasonable diligence and the governmental entity had a duty to exercise reasonable diligence to inquire into the matter.

Hawks, 960 S.W.2d at 15. The issue of whether the City had constructive notice is a question of fact. *See Reed v. Greene County*, 2005 WL 100843, at *4 (Tenn. Ct. App. Jan. 19, 2005). Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(b); *Kaplan*, 199 S.W.3d at 635.

The City contends that it did not have notice of the hole because "there had been no prior accidents at [the] particular location"; the City "never received any complaints or requests for maintenance of the condition at issue"; there was "no proof that anyone had notified the [City] of the problem at issue"; "[t]here [wa]s no evidence to prove that the City 'constructed' or 'built' the Field in a defective or dangerous condition"; and "the hole was not easily observable."

The Pettys assert that "[a] party can be charged with constructive notice even in the absence of any prior accidents" and that "the proof clearly shows that the hole in which Ms. Petty fell had existed for such a length of time that the City knew or should have known of its existence." *Cornell*

v. State, 118 S.W.3d 374, 378 (Tenn. Ct. App. 2003).[12] In support of this assertion, the Pettys claim that "Tennessee courts have held that the accumulation of plant growth is sufficient to support a finding of constructive notice," *Crowell v. Hackett*, 2000 WL 633525, at *4 (Tenn. Ct. App. May 12, 2000) (upholding a trial court's finding of constructive notice because "in order for the tree limbs to have obscured the stop sign..., the condition must have been in existence for a substantial period of time before the...accident"), and, consequently, that constructive notice should be imputed to the City because the hole into which Ms. Petty fell had been "filled with growing grass."

Ashley Smith, the City's current Director of Parks and Recreation, testified that part of his written job description was to conduct "facility inspections" and, in addition, that he would perform monthly "informal inspections" that were "[n]ot necessarily always documented but...[he would] note things that need[ed] to be repaired"; Mr. Smith, however, could not remember when he last inspected the Field prior to trial. Mr. Smith testified that the rule he had with his employees was that "if they see something that could be potentially hazardous [on the Field], then they are to fix it" and admitted that there were other holes on the Field that had been fixed prior to Ms. Petty's accident. Mr. Smith also testified that the hole which caused Ms. Petty's injury was located on the sidelines of the playing fields in the vicinity of the admission tables and that, prior to the date of the fall, he knew the location of WHCA's admission tables and that visitors would be walking to those tables.

Steven Russell, the Parks Maintenance Supervisor, testified that he worked as an equipment operator when first hired by the City and that his current job was to supervise the equipment operators. Mr. Russell stated that equipment operators were responsible for, among other things, mowing the grass on City property and that if an operator found a hole while mowing the Field, it was the operator's job to "fix it right then." Mr. Russell testified that, the day after Ms. Petty's accident, he was instructed by Mr. Smith to go to the Field and fix the hole into which Ms. Petty fell, that the hole was "probably 12 inches" deep, and that he filled the hole with "three-quarters" of a "5-gallon bucket" of dirt.

Mark Bagwell, an equipment operator, testified that he had fixed about a dozen holes, some prior to Ms. Petty's accident, and that all these holes were located on the sidelines of the playing fields. Mr. Bagwell described the location of the hole into which Ms. Petty fell as "bumpy" and a "pretty rough area."

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[12] The Pettys rely on this case for the proposition that:

> Proving notice of a dangerous or defective condition requires showing that either (1) the dangerous condition was created by the owners or his agent, or (2) if the condition was created by someone other than the owner or agent, the plaintiff must prove that the condition existed for such a length of time that the owner, in the exercise of ordinary care, knew or reasonably should have discovered and corrected the condition.

Cornell, 118 S.W.3d at 378 (citing *Jones v. Zayre, Inc.*, 600 S.W.2d 730, 732 (Tenn. Ct. App. 1980)).

We find that the evidence does not preponderate against the trial court's finding that the City had constructive notice of the hole into which Ms. Petty fell and, particularly, that the City, in the exercise of reasonable care and diligence, could have found the dangerous condition at issue. In addition to the vegetation growth found in the hole,[13] the City's employees testified that other holes, located in the same "sideline" area where Ms. Petty's injury occurred, had been found on the Field and that the employees were aware that the area was "bumpy" and "rough." The employees also testified that inspections of the Field were performed by maintenance workers in the course of their regular duties and that the supervisors would perform undocumented, informal inspections. The City's assertion that there were no prior accidents, notifications or requests for maintenance concerning the hole is more relevant to whether the City had actual notice of the hole, not constructive notice as found by the trial court. That preponderance of the evidence supports the imputation of constructive notice of the hole to the City and that the element of the exception to governmental immunity found at Tenn. Code Ann. § 29-20-204(b) has been met.

B. Evidentiary Issues

The City asserts that the trial court abused its discretion in allowing the evidence of Mr. Packard's inspection of the hole to be admitted at trial because the inspection "constituted inappropriate spoliation of evidence under Rule 34A.01 of the Tennessee Rules of Civil Procedure" and "therefore, any testimony or other evidence related to or stemming from the November 17, 2006 inspection should have been excluded from evidence." The City contends that a violation of Rule 34A.01, Tenn. R. Civ. P.,[14] permits sanctioning under Rule 37, Tenn. R. Civ. P., and that "[a]ccording to Rule 37, sanctions may include an order prohibiting an offending party from introducing designated matters into evidence."

The provision of Rule 37, Tenn. R. Civ. P., relied upon by the City to support its argument that the trial court should have excluded the evidence states, in part pertinent, that:

> If a deponent; party; an officer, director, or managing agent of a party; or, a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, or if a party fails to obey an order entered under Rule 26.06, the court in

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[13] While plant accumulation may be a consideration for determining the duration of a condition, the "length of time the condition existed is not the only factor to be considered in determining whether or not the proprietor had constructive notice of the danger." *Ramsey*, 1986 WL 2150, at *1 (Tenn. Ct. App. Feb. 12, 1986).

[14] Rule 34A.01, Tenn. R. Civ. P., states that:

> Before a party or an agent of a party, including experts hired by a party or counsel, conducts a test materially altering the condition of tangible things that relate to a claim or defense in a civil action, the party shall move the court for an order so permitting and specifying the conditions. Rule 37 sanctions may be imposed on an offending party.

> which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> ***
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence...

Tenn. R. Civ. P. 37.02. The City, however, does not allege that the Pettys "failed to provide or permit discovery" or that they "failed to obey an order entered under Rule 26.06." Rather, the City asserts that the evidence obtained from the inspection should be excluded under Rule 37, Tenn. R. Civ. P., because the Pettys violated Rule 34A, Tenn. R. Civ. P., and committed spoliation of evidence. Contrary to the City's assertion, Rule 37 does not provide a mechanism for excluding evidence on the basis of spoliation or violation of Rule 34A. The exclusion of evidence authorized pursuant to Rule 37, Tenn. R. Civ. P., is inapplicable.

Instead, "[t]he doctrine of spoliation of evidence permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence." *Bronson v. Umphries*, 138 S.W.3d 844, 854 (Tenn. Ct. App. 2003). This negative inference "arises only when the spoliation occurs in circumstances indicating fraud and a desire to suppress the truth. It does not arise when the destruction was a matter of routine with no fraudulent intent." *McLean v. Bourget's Bike Works, Inc.*, 2005 WL 2493479, at *4 (Tenn. Ct. App. Oct.7, 2005).

In its Motion to Exclude, the City contended that, contrary to the court's order, Mr. Packard "proceeded to dig a hole at the site where Ms. Petty's injury allegedly occurred" and that these "activities constitute[d] inappropriate spoliation of the evidence." The activities performed by Mr. Packard that the City specifically relied upon were outlined in his affidavit, filed in response to the City's Motion to Dismiss, which stated, in part pertinent, that:

> 3. On November 17, 2006, I inspected the site of plaintiff's fall. The site inspected was a hole located on a sports field in White House, Tennessee.
> 4. As the hole had been filled with sand, I was forced to excavate the hole.
> 5. Upon excavating the hole into which plaintiff stepped, I discovered that the hole contained an abandoned irrigation box.

In their Response to the Motion to Exclude, the Pettys alleged that Mr. Packard only "remove[d] debris" from the hole, in accordance with the trial court's order,[15] and that the City was

[15] The court's order allowed the Pettys and/or their agent "to inspect, photograph, remove debris, and measure hole width, diameter, and depth on the real property known as the 'Sports Field.'"

provided notice of, and was allowed to be present for, the inspection, at which the City raised no objection or comment to Mr. Packard's activities.[16] The trial court denied the City's motion.

Upon a review of the record, we find that Mr. Packard did not "intentionally alter" the hole "for an improper purpose," *Bronson*, 138 S.W.3d at 854, and that the Pettys did not attempt to "suppress the truth" or perform the inspection with "fraudulent intent." *McLean*, 2005 WL 2493479, at *4. Rather, the Pettys informed the City of the inspection, allowed the City to have a representative present, and even provided the City with notice that they were bringing an expert to perform the inspection.[17] Furthermore, Mr. Packard's actions were necessary to inspect the hole because, as his affidavit revealed, "the hole had been filled with sand." The record is devoid of any attempt by the City to perform its own inspection of the hole or any objection by the City to Mr. Packard's actions at time the inspection was taking place; in fact, the City watched and took pictures of Mr. Packard's inspection. The trial court did not err in allowing Mr. Packard's testimony and evidence obtained at the inspection to be admitted at trial.

The City also asserts that Mr. Packard's testimony and evidence obtained during the inspection should have been excluded as irrelevant, pursuant to Rule 402, Tenn. R. Evid., because the "evidence related to [Mr. Packard's] inspection d[id] not concern the hole into which Ms. Petty allegedly stepped, but rather concern[ed] the hole which Mr. Packard himself dug on the property." The City also contends that the evidence should have been excluded as overly prejudicial, pursuant to Rule 403, Tenn. R. Evid., because "no proof that the abandoned irrigation box caused or was in any way related to the hole that caused Ms. Petty's fall."[18]

"All relevant evidence is admissible...in the courts of Tennessee," but "[e]vidence which is not relevant is not admissible." Tenn. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. "The admission or exclusion of evidence is within the trial court's discretion." *White v. Vanderbilt*

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[16] Attached to their Response to the Motion to Exclude, the Pettys submitted an affidavit of their counsel, which stated that "[a]t no point during this process did defense counsel voice any objection of any kind to the inspection which was conducted...defense counsel took photographs throughout this process and at no time attempted to stop removal of debris from the hole," and an affidavit of Mr. Packard, which stated that "[a]t no time during the inspection did defense counsel or the representative from the City...request that I stop removing sand from the hole in question."

[17] Attached to their Response to the Motion to Exclude, the Pettys submitted a "Facsimile Transmission Cover Page" dated November 9, 2006, which was sent by their attorney to the City and stated that "[p]ursuant to the Court's Order..., please be advised that I have scheduled the inspection of the subject premises for November 17, 2006...and will be accompanied by Richard Packard of Packard Landscaping Company."

[18] Part of Mr. Packard's testimony was that, while performing his inspection at the Field, he found an abandoned water irrigation box at the bottom of the hole in which Ms. Petty fell.

Univ., 21 S.W.3d 215, 222 (Tenn. Ct. App. 1999). "Appellate courts will set aside a discretionary decision only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *Id*. at 223.

We find that the trial court did not abuse its discretion in finding Mr. Packard's testimony and evidence to be relevant to the present matter. Contrary to the City's assertion, the record reveals that Mr. Packard did not dig a separate hole, but rather "excavated" the hole into which Ms. Petty fell, which had been filled with sand.[19] The trial court did not "misconstrue[] or misappl[y] the controlling legal principles" by finding that the evidence and testimony of Mr. Packard's inspection of the actual hole into which Ms. Petty fell was relevant and the court did not abuse its discretion in allowing its admission at trial. We also find that the evidence was not overly prejudicial since Mr. Packard was testifying as to the inspection he performed on the hole at issue in this matter.

C. Discretionary Costs

The Pettys filed a Motion for Discretionary Costs, and an Amended Motion for Discretionary Costs, seeking $4,920.80 in discretionary costs pursuant to Rule 54, Tenn. R. Civ. P.; attached to the amended motion, the Pettys submitted 15 receipts that accounted for the total amount of discretionary costs sought. The costs awarded by the trial court that are at issue on appeal are two invoices submitted by Mr. Packard. The first invoice, dated November 20, 2006, was for $300 and contained the following handwritten description of the services provided: "Professional services for the subject project, including trip to site Nov. 17th (10:30-12:00) Photo's & CD." The second invoice, dated September 30, 2008, was for $487.50 and contained the following handwritten description of the services provided: "Professional services for the subject project 6.5 hr's @ 75.00 [sic]." In an order dated Oct. 23, 2008, the trial court found the Petty's Motion for Discretionary Costs "to be well taken and grant[ed] the [Pettys'] discretionary costs, however, exclude[d] the costs for expert Richard Fitzgerald[20] in the amount of Four Hundred Eight-Seven dollars and 50/100 ($487.50)."

The City asserts that the trial court erred in awarding discretionary costs for the 2006 invoice since the services provided are not recoverable under Rule 54.04, Tenn. R. Civ. P. The Pettys contend that the trial court erred in denying the award of discretionary costs for the 2008 invoice.

Rule 54.04, Tenn. R. Civ. P., states that:

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[19] The affidavit of the Pettys' counsel stated that "Plaintiff's granddaughter identified the hole which was the site of her grandmother's fall," that "[t]he hole which was the site of the plaintiff's fall had been filled with sand following the plaintiff's injury," and that "Plaintiff's expert proceeded to remove sand from the hole." Mr. Packard's affidavit confirmed these statements.

[20] The amount charged by Mr. Packard in his 2008 invoice is identical to the amount of costs excluded by the court; we assume the trial court most likely was referring to Richard Packard, not Fitzgerald.

> (1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs. . .
>
> (2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs. . . .

Tenn. R. Civ. P. 54.04.

Costs awarded in accordance with Rule 54.04, Tenn. R. Civ. P., are within the trial court's reasonable discretion. *Perdue v. Green Branch Min. Co., Inc.*, 837 S.W.2d 56, 60 (Tenn. 1992). This Court employs a deferential standard when reviewing a trial court's decision either to grant or to deny a Rule 54.04 motion. *Scholz v. S.B. Int'l, Inc.*, 40 S.W.3d 78, 84 (Tenn. Ct. App. 2000). Because these decisions are discretionary, this Court is generally disinclined to second-guess a trial court's decision unless the trial court has abused its discretion. *Woodlawn Mem'l Park, Inc. v. Keith*, 70 S.W.3d 691, 698 (Tenn. 2002); *Stallworth v. Grummons,* 36 S.W.3d 832, 836 (Tenn. Ct. App. 2000); *Mitchell v. Smith*, 779 S.W.2d 384, 392 (Tenn. Ct. App. 1989).

We find that the trial court exceeded its authority in awarding the costs for the 2006 invoice since the description provided on the invoice does not meet any of the discretionary costs allowed under Rule 54.04(2), Tenn. R. Civ. P., a fact that the Pettys do not dispute.[21] Furthermore, in support of their argument that the trial court erred in denying the costs for the 2008 invoice, the Pettys only state that "[t]he 2008 invoice was directly attributable to Mr. Packard's trial and deposition testimony in the May and September 2008 [sic]" and do not provide, at trial or on appeal, any argument, authority, or evidence to support that assertion. The Pettys' blanket assertion regarding the 2008 invoice, in the absence of argument in support, violates Rule 27, Tenn. R. App. P.,[22] and, consequently, the issue is waived. *See Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000) (holding that a party's "failure to comply with the Rules of Appellate Procedure and the rules of this Court waives the issues for review"). We, therefore, modify the trial court's award of discretionary costs by reducing the award to $4,133.30.

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[21] In their brief on appeal, the Pettys state that "[o]n its face, the [2006] invoice shows that it represents costs incurred for Mr. Packard's inspection of the hole in which Mrs. Petty fell" and argue that the 2008 invoice should have been awarded, "[e]ven if the 2006 invoice is not a proper discretionary cost."

[22] Rule 27, Tenn. R. App. P., states, in part pertinent, that:

> The brief of the appellant shall contain under appropriate headings and in the order here indicated:
> ***
> (7) An argument...setting for the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reason why the contentions require appellate relief, with citations to authorities and appropriate references to the record...relied on...

V. Conclusion

For the reasons set forth above, the decision of the Circuit Court is AFFIRMED as modified and REMANDED for proceedings consistent with this opinion. Costs are assessed against the City of White House, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE